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Nos. 02-1238, 02-1386 & 02-1405

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IN THE

Supreme Court of the United States

JEREMIAH W. (JAY) NIXON, ATTORNEY GENERAL OF MISSOURI,
Petitioner,

-AND-

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES,
Petitioners,

-AND-

SOUTHWESTERN BELL TELEPHONE, L.P.,
FKA SOUTHWESTERN BELL TELEPHONE COMPANY,
Petitioner,

v.

MISSOURI MUNICIPAL LEAGUE, *ET AL.*,
Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF UNITED STATES TELECOM ASSOCIATION AND VERIZON AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

The United States Telecom Association ("USTA") is a not-for-profit trade association for the local telephone industry, which represents some 600 facilities-based incumbent wireline providers of local telephone service. USTA has twenty-three members that provide local telephone service in Missouri.[1] The Verizon telephone companies ("Verizon")[2] together are the largest providers of wireline communications in the United States and offer local, long distance, data, and broadband (or high-speed data) services to customers in 49 States and the District of Columbia.

The construction of Section 253(a) of the Communications Act, 47 U.S.C. § 253(a), which was part of the reforms enacted by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act")

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1. Pursuant to Rule 37.6 of this Court, consents of counsel for the Petitioners and for the Respondents have been obtained and filed with the clerk of the Court. No counsel for any party has authored this brief, in whole or in part, and no person or entity, other than the *amici curiae*, their members, or counsel, have made monetary contributions to the preparation or submission of this brief.

2. The following Verizon telephone companies are wholly owned subsidiaries of Verizon Communications Inc., a publicly held company. These are: Contel of the South Inc. d/b/a Verizon Mid-States; GTE Midwest Inc. d/b/a Verizon Midwest; GTE Southwest Inc. d/b/a Verizon Southwest; The Micronesian Telecommunications Corp.; Verizon California Inc.; Verizon Delaware Inc.; Verizon Florida Inc.; Verizon Hawaii Inc.; Verizon Maryland Inc.; Verizon New England Inc.; Verizon New Jersey Inc.; Verizon New York Inc.; Verizon North Inc.; Verizon Northwest Inc.; Verizon Pennsylvania Inc.; Verizon South Inc.; Verizon Virginia Inc.; Verizon Washington, DC Inc.; Verizon West Coast Inc.; Verizon West Virginia Inc.; Bell Atlantic Communications Inc. d/b/a Verizon Long Distance; NYNEX Long Distance Company d/b/a Verizon Enterprise Solutions; and Verizon Select Services Inc.

directly affects all USTA members and Verizon. A growing number of municipalities throughout the country provide telecommunications services. This trend, as distinct from any other type of competition, raises substantial issues of fairness and competitive neutrality.

Municipal governments control the use of public rights-of-way, and have often misused that authority to require telephone companies to pay exorbitant fees for use of those rights-of-way or to force them to donate conduit or other facilities to the municipality's own use. This directly threatens Congress's goal of creating a level playing field for all telecommunications providers, expressed in Section 253(c), 47 U.S.C. § 253(c), which requires municipalities to administer rights of way "on a competitively neutral and nondiscriminatory basis." Municipalities also wield local taxing authority, which can be used to hobble private competitors and to raise capital outside of the normal discipline of the debt and equity markets. Finally, as recent events in the marketplace amply demonstrate, the telecommunications industry is a risky, capital-intensive business. Municipal government entry into the market, with its potential for support from public funds, creates substantial market uncertainties, suppresses competing private investment, and also can lead to serious municipal budgetary problems.

For all these reasons, *amici* support the right of state governments to limit the authority of their political subdivisions to undertake risky capital investments in competition with entities over which those localities exercise regulatory authority. *Amici* thus have a vital interest in the outcome of this case.

SUMMARY OF ARGUMENT

The petitions for a writ of certiorari present issues of national importance regarding the proper interpretation of a critical provision of the 1996 Act, over which the federal Courts of Appeals are in direct conflict. Indeed, in their opposition to certiorari, Respondents concede that the issue is an "important" one, Respondents' Brief in Opposition at 1 (filed May 19, 2003) ("Resp. Br."), and further concede a direct conflict between the decisions of the Eighth Circuit and the D.C. Circuit as well as the Supreme Court of the State of Nebraska. *See id.* at 4, 14. The decisions of the Eighth Circuit and the Nebraska Supreme Court are also in conflict with the decisions of the Federal Communications Commission ("FCC"), the agency that Congress charged with administration of this statutory scheme. *See* 47 U.S.C. § 253(d) (giving the FCC authority to adjudicate preemption claims under Sections 253(a) and (b)). Thus, as the Brief in Opposition concedes, the criteria for certiorari are met. *See* Sup. Ct. R. 10 (a)-(b).

The petitions also implicate principles at the core of our national system of dual sovereignty. The Eighth Circuit construed Section 253(a) to impair the power of States to shape and control the activities of their political subdivisions, an essential attribute of state sovereignty. This case does not involve the mere extension of federal law into an area traditionally reserved to the States. Rather, it concerns the much more fundamental question of whether Congress intended in a generally worded statute to strike at the heart of the States' ability to delegate – or not to delegate – power to their own political subdivisions.

Against this background, it is clear that the decision of the Eighth Circuit cannot be squared with this Court's precedent. The Eighth Circuit held that the 1996 Act preempted the Missouri statute solely because Congress used the word "any" to modify "entity" in Section 253(a). *See Mo. Mun. League v. FCC*, 299 F.3d 949, 953-55 (8th Cir. 2002), *petitions for cert. filed*, 71 U.S.L.W. 3568, 3624, 3625 (Feb. 18 & Mar. 20, 2003). In *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991), however, this Court made clear that a federal court may not impute to Congress the intent to interfere with a fundamental aspect of state sovereignty absent a plain statement of such intent. Nothing in the text or history of Section 253(a) suggests a congressional desire to intrude into state sovereignty in this drastic way. To the contrary, the more limited purpose of Section 253(a) was to prevent both State and local governments from erecting barriers to the provision of telecommunications services by private entities within their jurisdiction. The Eighth Circuit's interpretation of *Gregory*, if permitted to stand, would effectively read the plain-statement rule out of existence and allow courts to presume that Congress, *sub silentio*, intended to interfere with matters that lie at the core of state sovereignty.

The Missouri statute reflects a legitimate concern over whether its subdivisions should be engaged in risky, capital-intensive enterprises outside of their traditional role of local governance. Missouri and at least eleven other States have passed laws prohibiting or restricting the provision of telecommunications services by political subdivisions. These laws represent a collective legislative judgment in those States that municipalities – which enjoy unfair advantages over private competitors, are in many cases ill-suited for the demands of the private marketplace, and whose entry into risky commercial enterprises would jeopardize public funds

– should not be authorized to enter the telecommunications business. Nothing in the 1996 Act strips Missouri or any other State of the right to make fundamental choices about the operations of their own political subdivisions, which by their very nature exercise only that authority delegated to them by the State. This Court's intervention is necessary to correct the Eighth Circuit's errors and ensure a uniform, national rule on which both States and private companies can rely.

ARGUMENT

I. THE DECISION BELOW FAILS TO RECOGNIZE THAT STATES HAVE COMPELLING REASONS TO PROHIBIT OR LIMIT THEIR POLITICAL SUBDIVISIONS' PROVISION OF TELECOMMUNICATIONS SERVICES.

The Missouri statute legitimately responds to a relatively recent development in the telecommunications industry: municipalities that offer traditional telephone, cable, Internet access, or broadband services in competition with private industry.[3] A study released in January 2001 estimated that 61 municipalities offered Internet access services, 32 provided high-speed data services, and 18 offered local dial tone services. *See* Jeffrey A. Eisenach, *Does Government Belong in the Telecom Business?*, 8.1 Progress on Point 18-23 (Jan. 2001), *at* http://www.pff.org/

3. The Missouri statute provides, in relevant part: "No political subdivision of this state shall provide or offer for sale, either to the public or to a telecommunications provider, a telecommunications service or telecommunications facility used to provide a telecommunications service . . . ." Mo. Ann. Stat. § 392.410(7) (West Supp. 2003). The statute was extended by the Missouri legislature in July of 2002 and now has an expiration date of August 28, 2007. *See Mo. Mun. League*, 299 F.3d at 952 n.3.

POP8.1GovtTelecom011001LOGO.pdf. These numbers since have increased dramatically. The American Public Power Association has reported that, at the end of 2002, over 500 public utilities offered some type of broadband telecommunications services – from fiber leasing to Internet access to local telephone service. *See* American Public Power Association, *Public Power: Powering the 21st Century with Community Broadband Services* (Jan. 2003), *at* http://www.appanet.org/pdfreq.cfm?PATH_INFO=/LegislativeRegulatory/Broadband/Telecom%20Fact%20Sheet_1-2003.pdf&VARACTION=GO. This trend is expected to continue as more and more municipalities and local governments consider building telecommunications and broadband networks. *See, e.g., Large Number of Municipal Utilities Eying the Broadband Market*, Communications Daily, Apr. 1, 2003.

In response to this trend, at least twelve States, including Missouri, have passed laws that prohibit or restrict political subdivisions from entering the telecommunications market.[4]

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4. These states are: Arkansas (Ark. Code Ann. § 23-17-409 (Michie 2002)), Florida (Fla. Stat. Ann. § 166.047 (1989 & Supp. 2003)), Minnesota (Minn. Stat. Ann. § 237.19 (West 2002)), Nevada (Nev. Rev. Stat. Ann. § 268.086 (Michie Supp. 2001)), South Carolina (S.C. Code Ann. § 58-9-2600 (2002)), Tennessee (Tenn. Code Ann. §§ 7-52-601 to -611 (Supp. 2001)), Texas (Tex. Util. Code Ann. §§ 54.201-261 (Vernon 2002)), Utah (Utah Code Ann. §§ 10-18-101 to -306 (2003)), Virginia (Va. Code Ann. § 15.2-2160 (Michie Supp. 2002)), and Washington (Wash. Rev. Code § 54.16.330 (2003)). In addition, the statute at issue in the case before the Nebraska Supreme Court was intended to limit the provision of telecommunications services by municipalities. *In re Lincoln Elec. Sys.*, 655 N.W.2d 363, 371-72 (2003), *petitions for cert. filed*, 71 U.S.L.W. 3709 (Apr. 30 & May 1, 2003).

These laws range from outright bans on the provision of telecommunications services by municipalities to procedural protections that municipalities must satisfy before they may offer such services.[5] As discussed below, ample justifications exist for these prohibitions and conditions of service.

A. Because municipalities are governmental entities with delegated state police powers at their disposal, local governments that compete directly with private companies enjoy several unfair advantages. First, municipalities control access to the public rights-of-way and may leverage that control to exclude or disadvantage private companies that compete with them. Second, municipalities are also often exempt from the fees, taxes, and regulatory requirements to which private companies are subject. Third, municipal telecommunications enterprises may interfere with statewide regulation of telecommunications services, which most States have lodged exclusively in a statewide public service commission. Finally, municipal entry into the marketplace suppresses private investment, because it creates regulatory uncertainty and introduces a competitor who can raise funds through the exercise of sovereign power outside the normal constraints of the capital and debt markets.

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5. *See, e.g.*, Fla. Stat. Ann. § 166.047 (1989 & Supp. 2003) (imposing taxes on prices of telecommunications services provided by public entities); Minn. Stat. Ann. § 237.19 (West 2003) (requiring municipalities to obtain 65% super-majority of voters before providing telecommunications services); Tenn. Code Ann. § 7-52-602 (Supp. 2001) (requiring municipalities to meet disclosure and voting requirements); Va. Code Ann. § 15.2-2160 (Michie Supp. 2002) (requiring localities providing telecommunications services to publish annual financial statements and to estimate taxes and other fees that they would have to pay were they for-profit providers, and mandating that they give private providers nondiscriminatory access to public rights-of-way, poles, conduits, and other publicly owned facilities).

In most areas, municipalities have the ability to set the terms and conditions for their competitors' access to public rights-of-way. The 1996 Act grants States and municipalities the authority to manage the public rights-of-way and to require "fair and reasonable compensation" for their use.[6] Under this system, private companies must apply to municipalities for permission to access streets, sidewalks, utility poles, conduits, or public lands in order to install cable and wires. In exchange for this access, private companies pay local governments a fee. Rights-of-way fees, however, vary widely from place to place. In some areas, despite the 1996 Act's mandate that municipalities charge only "fair and reasonable compensation," municipalities often assess rights-of-way fees that are unrelated to the costs of maintaining the rights-of-way but based instead on revenue or "rent." *See, e.g., City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1175-76 (9th Cir. 2001) (holding that rights-of-way fees based on a percentage of private companies' gross revenues violate Section 253(c)), *cert. denied*, 534 U.S. 1079 (2002). Local governments may use this regulatory authority over the public rights-of-way to discriminate against private competitors. They may charge excessive rights-of-way fees before granting private companies permission to lay wire or access utility poles, charges that private companies must absorb or pass

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6. 47 U.S.C. § 253(c) provides:

> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

along to customers through higher rates or charges. Or municipalities may impose onerous permit or application requirements that complicate or delay competitors' access to the public rights-of-way. And municipalities may exempt themselves from the very same requirements that they impose on private companies. A city in Florida, for example, after beginning to compete with the city's incumbent cable provider, required the private cable company to pay five percent of its gross revenues as a franchise fee, a fee which the municipality in turn exempted itself from paying. *See* Kathryn A. Tongue, *Municipal Entry into the Broadband Cable Market: Recognizing the Inequities Inherent in Allowing Publicly Owned Cable Systems to Compete Directly Against Private Providers*, 95 N.W. U. L. REV. 1099, 1118 (2001).

Municipalities may also require private companies to provide free conduit or other facilities as a condition for access to public rights-of-way, thus misusing regulatory authority to gain a zero basis asset for municipal use in competition with private companies.[7] Municipal provision of telecommunications services thus creates incentives directly contrary to Congress' command that localities

7. Numerous federal court decisions have struck down requirements that private companies build and dedicate telecommunications facilities to municipalities as a condition for placing private telecommunications infrastructure under the city streets. *See, e.g.*, *City of Auburn*, 260 F.3d at 1179 (*citing AT&T Comm. of S.W., Inc. v. City of Dallas*, 8 F. Supp. 2d 582, 593 (N.D. Tex. 1998)); *see also Qwest Corp. v. City of Santa Fe, N.M.*, 224 F. Supp. 2d 1305, 1309, 1330-31 (D.N.M. 2002) (holding that Section 253 preempts local requirement that private provider "dedicate all conduit laid upon the City's property to the City" and upon installation of new conduit "install double the amount of capacity needed for the applicant's own use").

administer rights-of-way "on a competitively neutral and nondiscriminatory basis." *See* 47 U.S.C. § 253(c).

Municipalities also enjoy a host of other advantages over private companies. Local governments may issue tax-free, interest-free or reduced interest loans in order to raise capital or pay operating expenses. They are not subject to property or corporate income taxes like private companies. Municipalities also have the ability to raise taxes to subsidize losses or maintain artificially low rates or to shift costs to customers of electric or other services where the municipality faces no competition. Further, by virtue of their "inside" status, municipalities may enjoy preferential treatment for municipal contracts or have access to knowledge of bidding processes for other government projects. Municipalities may require that local telecommunications services be provided by the municipal enterprise, thus excluding private companies from competition for that business.

These unfair advantages deter private sector investment – and thus undermine a central goal of the 1996 Act. The 1996 Act was passed to establish "a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly *private sector* deployment of advanced telecommunications and information technologies and services to all Americans by opening all markets to competition." S. Conf. Rep. No. 104-230, at 1 (1996) (emphasis added). The FCC also has recognized that "only facilities-based competition can fully unleash competing providers' abilities and incentives to innovate." *Promotion of Competitive Networks in Local Telecommunications Markets*, Notice of Proposed Rulemaking, FCC No. 99-141, 14 F.C.C.R. 12,673, ¶ 4 (1999); *see also Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 F.C.C.R. 3696, ¶ 110 (1999) ("fundamental

goal of the Act" is the promotion of facilities-based competition, investment, and innovation). The 1996 Act thus envisioned competition among private companies offering services via their own equipment and facilities, and the focus of the 1996 Act was on creating competition among multiple private providers through the development of facilities-based services.

For this goal of facilities-based competition to be realized, private companies *must* have incentives to invest the enormous up-front capital that such equipment and facilities necessarily require. Private industry has little economic incentive to invest in upgrading networks or building out new facilities in areas in which municipalities have an unfair advantage over competitors or where the return on those investments is undermined by artificially subsidized rates. Thus, a State such as Missouri might rationally conclude that municipal provision of telecommunications services is not worth the candle, and instead focus its telecommunications policy on the encouragement of private investment in new infrastructure.

B. State laws prohibiting municipal telecommunications enterprises are also justified as a means of ensuring that public funds are not placed at risk through commercial investments by municipalities. States clearly have an interest in protecting the coffers of their political subdivisions, since States could be forced to bail out failed municipal ventures or rescue localities from insolvency. Telecommunications is a volatile, technologically complex, and capital-intensive industry. News accounts are filled with examples of municipal-owned networks that have lost money, diverted funds from other pressing priorities, and overburdened taxpayers.

For example, in the late 1990s the city of Eugene, Oregon, planned an 800-mile digital telecommunications network. The city scrapped those plans several years later when it concluded that its original estimate of $6 million was too low and that its network actually would cost $240 million to complete. Janet Colwell, *Broadband's Broad Price Tag: Faced With Hard Numbers, Eugene is Scaling Back Plans for a Citywide Telecom Network*, Oregon Business, Apr. 1, 2001, at 39. In Tacoma, Washington, the city built a fiber-optic high-speed network called "Click!" In 1997, the city's budget estimate for the project was $40 million. By the year 2000, the city's costs had more than doubled, to almost $90 million, and Tacoma Public Utilities was forced to assess a 50% surcharge on customer bills. Paul Guppy, *When Government Enters the Telecom Market: An Assessment of Tacoma's Click! Network*, 9.7 Progress on Point 5-6 (Feb. 2002), *at* www.pff.org/publications/pop9.7guppyclick.pdf. Similarly, in Grant County, Washington, a public utility raised electricity rates to subsidize losses from its telecommunications operations. Although the utility had invested $60 million in a fiber-optic network that served 9,000 households, in early 2003 only 4,100 households had purchased Internet, telephone or television services from the municipal utility, and officials projected a scant $2 million in revenues for 2003, revenues which were not expected to cover operations and maintenance. Bert Caldwell, *Utilities May Want To Move Slowly*, The Spokesman-Review, Apr. 10, 2003, at A-16.

States must be permitted to decide whether their political subdivisions can or should compete in the private marketplace, as Missouri has done here. Indeed, at the end of the day, a State may well be liable for its political subdivisions' investment "mistakes" in this rapidly evolving

and competitive market. All courts that have considered the question agree that the power of a State to oversee and control the activities of its localities is an essential aspect of sovereign authority. Entirely absent from the Eighth Circuit's decision, however, is the recognition that the Missouri legislature has both the responsibility and the right to weigh these concerns and determine that the telecommunications marketplace is best left to non-governmental providers.

II. THIS COURT SHOULD GRANT REVIEW TO CORRECT THE EIGHTH CIRCUIT'S ERROR OF STATUTORY CONSTRUCTION AND ITS REFUSAL TO PROPERLY APPLY THE PLAIN-STATEMENT RULE.

The questions presented in the petitions for certiorari raise important issues of statutory construction and federalism, over which the federal Courts of Appeals have issued conflicting opinions. The Eighth Circuit's conclusion that Section 253(a) evinces an intent by Congress to interfere with a State's authority to control its political subdivisions upsets the constitutional balance between the federal government and the States. The decision below badly misconstrues this statute and misapplies the plain-statement rule of *Gregory v. Ashcroft*. As a result, the Eighth Circuit's ruling sets a dangerous precedent that other lower courts may use to improperly infer congressional intent to interfere with core state functions.

A. The Constitution creates a system of dual sovereignty between the federal government and the States. "'States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause.'" *Gregory v. Ashcroft*, 501 U.S. 452, 457

(1991) (quoting *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990)). Under this system, the federal government has limited, enumerated powers, and the States retain all "powers not delegated to the United States by the Constitution, nor prohibited by it to the States." U.S. Const. amend. X.

These include the power to prescribe the qualifications of a State's own officers, the power to control its political processes, and the authority implicated here – the power to regulate the activities of its political subdivisions. As this Court long has recognized, the State's power to organize itself into subdivisions and to delegate (or not to delegate) its powers to those subdivisions is a core structural authority that affects the State's exercise of all its substantive powers. *See City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 437 (2002) ("[w]hether and how" to subdivide and delegate substantive power "is a question central to state self-government"); *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978) (States have "wide latitude . . . in creating various types of political subdivisions and conferring authority upon them"); *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907) ("The number, nature, and duration of the powers conferred upon [political subdivisions] . . . rests in the absolute discretion of the state."). Thus, among the most sacrosanct of a State's powers are those of self-organization, i.e., the manner in which a "state defines itself as a sovereign." *Gregory*, 501 U.S. at 460.[8]

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8. Given that the State's power to organize itself into governmental units is a core attribute of state sovereignty, Respondents' emphasis on *Salinas v. United States*, 522 U.S. 52 (1997), is misplaced. *See* Resp. Br. at 2, 6-9. The statute at issue in *Salinas* did not involve federal intrusion into the States' ability to organize their own structure of governance. *See Salinas*, 522 U.S. at 60-61. Here, by contrast, the Eighth Circuit read Section 253(a)

(Cont'd)

Congress may, of course, legislate in areas traditionally governed by the States if those areas are otherwise within the scope of its enumerated powers. Congress did just that in enacting the 1996 Act. For most of the twentieth century, local telephone service was treated as a natural monopoly and was provided under a system of exclusive local franchises granted by the States. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). The 1996 Act created a new "national policy framework" for regulation of local competition that supplanted the state-run franchise system. *Id.* Under this framework, States have an important – but circumscribed – role in the new federal regime.

For example, Sections 251 and 252 of the Communications Act, 47 U.S.C. §§ 251-252, both 1996 Act additions, allocate limited responsibilities to the state public utility commissions. *Id.* Section 251 establishes that incumbent carriers must allow other carriers to interconnect with their facilities and equipment and requires incumbents to share parts of their networks with competitors. *Id.* § 251(a)-(c). Section 252 grants state commissions the power to arbitrate disputes and to approve (or reject) these "interconnection agreements" according to federal standards. *Id.* § 252(b)-(c). States are also charged with setting specific pricing standards for unbundled network elements in conformance with the price standards set out in the 1996 Act and the FCC's governing rules. *Id.* § 252(d); *Iowa Utils. Bd.*, 525 U.S. at 371-73.

Out of respect for our national system of dual sovereignty, this Court repeatedly has required that any

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(Cont'd)
to drive a wedge between the State and its own political subdivision, creating rights in the political subdivision that may be asserted against the State and overriding the State's choice of what rights and duties to devolve upon the subdivision.

Congressional enactment that alters the constitutional balance between the federal government and the States be "unmistakably clear." *Gregory*, 501 U.S. at 460 (internal quotations and citations omitted). Thus, courts will not interpret a federal statute in such a way as to intrude upon an area traditionally regulated by the States absent a clear expression of congressional intent to do so. *Id.* This rule not only protects the proper balance of power between the federal government and the States, it also effectuates "the doctrine that statutes should be construed so as to avoid difficult constitutional questions." *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 787 (2000). As applied in the context of state authority to create and define the powers of political subdivisions, the rule teaches that "federal courts should resist attribution to Congress of a design to disturb a State's decision on the division of authority between the State's central and local units." *City of Columbus*, 536 U.S. at 440.

B. The relevant language of Section 253(a) does not approach the unmistakable clarity necessary to satisfy the plain-statement rule. Section 253(a) provides, in relevant part: "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of *any entity* to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a) (emphasis added). On its face, Section 253(a) says nothing about whether Congress intended the term "entity" to extend to the political subdivisions of a State. The term "entity" is not defined in the 1996 Act, nor was the meaning of the phrase "any entity" the subject of congressional testimony or reports. As the D.C. Circuit observed in reviewing the language of Section 253(a), "it was not plain to the [FCC], and it is not plain to us," that Section 253(a) was meant to

include political subdivisions. *City of Abilene v. FCC*, 164 F.3d 49, 54 (1999).

On the contrary, both the purpose and the structure of the 1996 Act make clear that Congress intended the term "entity" in Section 253(a) to apply to private companies, not municipalities. As explained above, the 1996 Act was enacted to stimulate competition in the private sector and to encourage competition between private companies. *See supra* p. 10 (quoting S. Conf. Rep. No. 104-230, at 1 (1996) (1996 Act was passed to establish "a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly *private sector* deployment of advanced telecommunications and information technologies and services to all Americans by opening all markets to competition") (emphasis added)). Section 253(a) in particular was enacted to "end[] the States' longstanding practice of granting and maintaining local exchange monopolies." *See Iowa Utils. Bd.*, 525 U.S. at 405 (Thomas, J., dissenting).

The word "entity" as used in Section 253(a) thus was intended to refer to private companies, including those who prior to the passage of the 1996 Act were excluded from the telecommunications market by the state-sanctioned local franchise system. The statute was designed to protect private entities from state or local regulation that excluded private competitors or attempted to advantage or disadvantage one private competitor over another. Section 253(a) accordingly removed the barriers to private competition that had previously existed in state and local laws, required any state regulation of those private companies to be applied on a competitively neutral and nondiscriminatory basis, and granted the FCC authority to preempt state or local

regulations that prevented new private competitors from entering the local exchange market. *See, e.g., City of Auburn*, 260 F.3d at 1170.[9]

The Eighth Circuit's contrary conclusion ignores both the structure and purpose of Section 253(a) and this Court's repeated admonitions regarding the need for an exceedingly plain statement before a congressional intent to interfere in core state functions is inferred. The Eighth Circuit reached this erroneous result by myopically focusing on the use of the adjective "any" in Section 253(a). But as the Court recently made clear, use of the modifier "any" does not, without more, satisfy *Gregory*'s plain-statement rule. In *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533 (2002), the Court examined the scope of the supplemental jurisdiction statute, 28 U.S.C. § 1367(d), which provides for the tolling of a state statute of limitations for "any claim" that a federal court dismisses under its supplemental jurisdiction. The issue before the Court was whether Section 1367(d) applied to claims against non-consenting States that are ultimately dismissed on Eleventh Amendment grounds.

This Court held that, although Section 1367(d) pertains on its face to "any" claim, it could not be read to apply in the context of suits against States:

> With respect to the claims the tolling provision covers, one could read § 1367(d) to cover any

9. Indeed, in Section 253(a) itself Congress prohibited not only state but also "local" regulation that creates barriers to market entry. Congress thus put *all* governmental authority – state and local – on one side of the Section 253(a) equation and private entities providing telecommunications services on the other. In addition, Congress specifically used the term "local government" in both Sections 253(c) and (d), *see* 47 U.S.C. § 253(c)-(d), further indicating that the word "entity" was not meant to encompass "local governments" in this statute.

> claim "asserted" under subsection (a), but we have previously found similarly general language insufficient to satisfy clear statement requirements. For example, we have held that a statute providing civil remedies for violations committed by "'*any* recipient of federal assistance'" was "not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment" even when it was undisputed that a state defendant was a recipient of federal aid. Instead, we held that "[w]hen Congress chooses to subject the States to federal jurisdiction, it must do so specifically." Likewise, §1367(d) reflects no specific or unequivocal intent to toll the statute of limitations for claims asserted against nonconsenting States . . . .

Id. at 544-45 (citations omitted) (alteration in original).[10]

Raygor reinforces the principle that *Gregory* requires more than use of the word "any"; it requires an affirmative indication that Congress clearly intended to intrude into matters at the heart of state sovereignty. No such indication exists here. As the D.C. Circuit made clear in its opinion, the fact that it is "linguistically possible to include a municipality under the heading 'entity'" is not a sufficient basis to find preemption. *City of Abilene*, 164 F.3d at 52. "If it were, *Gregory*'s rule of construction would never be needed." *Id.* at 53.

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10. Obviously, the harm to state sovereignty at issue in *Raygor* – relaxation of a state statute of limitations – pales in comparison to the intrusion into state sovereignty that the Eighth Circuit found implicit in Section 253(a), which goes to the heart of a State's authority to decide which powers to delegate (or not to delegate) to its political subdivisions.

The Court should grant certiorari to correct the Eighth Circuit's misapplication of *Gregory* and to reinvigorate the plain-statement rule, which will in turn ensure that States retain their sovereign power to make choices about their governmental structures and thereby ensure the responsible operations of their political subdivisions.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be granted.

Respectfully submitted,

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